

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JONATHAN CALL,

Defendant.

Case No. 2:12-cr-00163-LDG-CWH

**ORDER**

**Motion to Prohibit the Defendant  
From Possessing Firearms and  
Ammunition - #37**

This matter is before the Court on the Government's Motion to Prohibit the Defendant from Possessing Firearms and Ammunition (#37), filed on May 21, 2012; Defendant's Opposition to the Government's Motion to Prohibit the Defendant from Possessing Firearms and Ammunition (#38), filed on May 23, 2012; and the Government's Reply [in support of] Motion to Prohibit the Defendant from Possessing Firearms and Ammunition (#41), filed on May 30, 2012.

**BACKGROUND**

Defendant Jonathan Call was initially charged in a criminal complaint, filed on August 25, 2011, with a conspiracy to defraud the United States Government in violation of 18 U.S.C. §371 and embezzlement of public property in violation of 18 U.S.C. §641. *Complaint* (#2). The complaint alleged that Mr. Call is the operator of a business known as Citadel Gun & Safe. It further alleged that Mr. Call had received and sold, or offered to sale, stolen United States military equipment including military-specification body armor plates, interceptor vests, military-specification infrared strobe lights, a chemical warfare suit, military strength laser pointers, M-192 Heavy Weapons mounts, boxes of Meals Ready to Eat ("MRE's"), and night vision goggles. The complaint also alleged that Mr. Call or Citadel Gun & Safe was in possession of a large number of

firearms, although there was no allegation that any of the firearms were stolen or illegal. Mr. Call made his initial appearance before the Court on the criminal complaint on September 21, 2011. At that time the Court scheduled a preliminary hearing and imposed conditions of pretrial release on Mr. Call which included the standard condition that Defendant not violate any federal, state or local law while on release. *Defendant's Appearance Bond and Order Setting Conditions of Release* (#14).

On September 28, 2011, the Government filed a petition for action on conditions of pretrial release which requested that the following conditions be added to Defendant's conditions of release:

1. Pretrial Services Supervision.
2. Refrain from the use or possession of a firearm, destructive device or other dangerous weapon.
3. Surrender all firearms, destructive devices or other dangerous weapons to a third party within 72 hours.
4. Defendant is restricted from the sale of firearms in a personal or business capacity, however, may continue to sell firearms parts and accessories in Citadel Gun & Safe.

*Petition for Action on Conditions of Pretrial Release* (#15, #16).

The Court conducted a hearing on the petition on October 6, 2011. The Court granted the petition by adding the condition that Defendant refrain from possessing firearms, destructive devices or other dangerous weapons, with the exception that Defendant was allowed to keep three identified firearms at his residence for the protection of himself and his family. The Court further ordered that Defendant surrender all other firearms to a third party within 72 hours and prohibited Defendant from selling firearms in a personal or business capacity, but permitted him to sell his existing firearms on consignment so long as the seller's (consignee's) name was provided to pretrial services. *Amended Appearance Bond and Order Setting Conditions of Pretrial Release* (#21), filed October 6, 2011. Although the conditions proposed in the Petition (#15, #16) provided that Defendant "may continue to sell firearms parts and accessories in Citadel Gun & Safe," this limitation was not included in the *Amended Appearance Bond and Order Setting Conditions of Release* (#21). This was an oversight by the Court and was not an intentional rejection of that limitation. The petition and order did not expressly address the sale of ammunition. The Court is

1 informed Citadel Gun & Safe continued to sell ammunition after entry of the order on October 6,  
2 2011.<sup>1</sup>

3 Mr. Call was indicted on May 9, 2012 on two counts of theft of government property having  
4 a value in excess of \$1,000.00 in violation of 18 U.S.C. §641 and 18 U.S.C. §2. *Indictment* (#30).  
5 A person convicted for a violation of §641 may be imprisoned for not more than 10 years. 18  
6 U.S.C. §922(n) makes it “unlawful for any person who is under indictment for a crime punishable  
7 by imprisonment for a term exceeding one year to ship or transport in interstate or foreign  
8 commerce any firearm or ammunition or receive any firearm or ammunition which has been  
9 shipped or transported in interstate or foreign commerce.” Based on this statute and the indictment,  
10 the Government requests that Mr. Call’s conditions of pre-trial release be modified to prohibit him  
11 from possessing any firearms or ammunition. The Government’s motion includes the three  
12 firearms that Mr. Call has been authorized to keep for home protection as well as ammunition for  
13 those firearms. The Government also asserts that Mr. Call cannot work in or operate a store that  
14 sells ammunition without violating §922(n).

### 15 DISCUSSION

#### 16 **1. Defendant’s Possession of Three Firearms for Self Defense Purposes.**

17 18 U.S.C. §922(n) does not make it unlawful for a person under indictment to possess  
18 firearms or ammunition that he received prior to the indictment. *See United States v. Laurent*, —  
19 F.Supp.2d —, 2011 WL 6004606, \*2 (E.D.N.Y. 2011) (“By its own terms, §922(n) does not  
20 prohibit *possession* of a weapon by someone under indictment, but only shipping, transportation or  
21 *receipt*.”) *Id.* at \*6. To prove a violation of §922(n), “the government is required to demonstrate  
22 that the defendant received the weapon *after* indictment.” *Id.* at \*2. *See also United States v.*  
23 *Adams*, 2011 WL 1475978 (S.D. Ala. 2011) (dismissing an indictment under §922(n) that charged  
24 only possession). Prior to indictment, the Court authorized Mr. Call to keep three identified  
25 firearms at home for defense of himself and his family. *Amended Appearance Bond and Order*

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28 <sup>1</sup>The Defendant no longer has a license to sell firearms and therefore did not oppose the  
condition that he not sell firearms.

1 *Setting Conditions of Pretrial Release* (#21). There is no allegation that Mr. Call has engaged in  
 2 any conduct that would now justify an order prohibiting him from possessing the firearms or  
 3 ammunition for those firearms. The Court therefore denies the Government's motion to the extent  
 4 it seeks to prohibit Mr. Call from possessing the three firearms that the Court previously authorized  
 5 him to keep.

6 **2. Whether §922(n) Prohibits Mr. Call From Working in a Business that**  
 7 **Sells Ammunition.**

8 The next issue is whether 18 U.S.C. §922(n) prohibits Mr. Call from continuing to work at  
 9 Citadel Gun & Safe so long as its business includes the sale of ammunition. Pursuant to 18 U.S.C.  
 10 §3142(b), Mr. Call's conditions of pretrial release state that he "must not violate any federal, state  
 11 or local law while on release." *Defendant's Appearance Bond and Order Setting Conditions of*  
 12 *Release* (#14), *Condition No.(1)*. Thus, the prohibition in §922(n) is already a condition of Mr.  
 13 Call's release to the extent the statute is valid and applies to his conduct.

14 In *United States v. Craven*, 478 F.2d 1329 (6<sup>th</sup> Cir. 1973), the defendant was convicted  
 15 under 18 U.S.C. §922(h)(1), the predecessor statute to §922(n), based on his receipt of a firearm  
 16 after he was indicted on a state felony charge. The defendant appealed on the grounds that the  
 17 government failed to show that he possessed the subject firearm and that proof of possession was  
 18 not sufficient to prove receipt. In affirming the conviction, the Sixth Circuit stated that possession  
 19 may be either actual or constructive. "Actual possession exists when a tangible object is in the  
 20 immediate possession or control of the party. Constructive possession exists when a person does  
 21 not have actual possession, but instead knowingly has the power and intention at a given time to  
 22 exercise dominion and control over an object, either directly or through others." *Id.* 478 F.2d at  
 23 1333. Although the quoted statement was made in regard to other counts on which defendant was  
 24 convicted, the court applied the same definition of possession in regard to the charge under  
 25 §922(h)(1). The court stated:

26 The prosecution produced evidence sufficient to warrant a jury in  
 27 finding that Craven had constructive possession of the revolver. The  
 28 government's proof indicated that the defendant had, at a minimum,  
 joint constructive possession of the house and that only eight days  
 prior to the date the defendant was charged with possessing the

1           weapon, he was seen in the master bedroom of the residence sitting  
2           in bed with a revolver which looked like the firearm named in Count  
3           IV lying on the bed.

4           *Craven*, 478 F.2d at 1335.

5           The court also held that evidence of possession was circumstantial evidence that the  
6           defendant received the firearm:

7                       Since one cannot possess something, either actually or constructively,  
8                       without receiving it, either actually or constructively (except when  
9                       the possessor manufactures it himself), receipt under 18 U.S.C. §  
10                      922(h)(1) may be shown circumstantially by proving possession, at  
11                      least where no significant passage of time has elapsed between the  
12                      interstate transportation and proof of possession, and no intervening  
13                      intrastate transactions have occurred.

14           *Id.* 478 F.2d at 1336-37.

15           Defendant argues that he should not be prohibited from working at Citadel Gun & Safe so  
16           long as he is not personally involved in the receipt, shipment or transport of ammunition.  
17           Defendant compares his situation to that of an individual under indictment who works in a sporting  
18           goods store or at Wal-Mart where ammunition is received and sold. Defendant argues: “Surely  
19           Walmart would not be required to stop ordering and selling ammunition and surely the employee  
20           would not be forced to quit his job at Walmart if he would have no involvement with the handling,  
21           ordering, shipping, or selling of ammunition.” *Defendant’s Opposition* (#38), pg. 13. Defendant  
22           argues that the prohibition in §922(n) can be satisfied by adding the condition that “Mr. Call not  
23           personally order, touch, ship and sell ammunition.” *Id.* Defendant indicates that other employees  
24           of Citadel Gun & Safe would conduct business activities relating to ammunition sales.

25           The fallacy of Defendant’s Wal-Mart analogy and proposed condition is that they do not  
26           address Mr. Call’s apparent dominion and control over the operations of Citadel Gun & Safe,  
27           including the sale of ammunition. Mr. Call’s continued operational control over that business is  
28           problematical under §922(n), regardless of whether or not he “personally” orders, touches, ships or  
                  sells ammunition. The issue is not simply whether a particular condition of pretrial release must or  
                  should be imposed. A willful violation of §922(n) is a criminal offense punishable by  
                  imprisonment for up to five years and a \$250,000 fine. *See* 18 U.S.C. §924(a)(1)(D) and 18 U.S.C.  
                  §3571(b)(3). *See also United States v. Hayden*, 64 F.3d 126 (3<sup>rd</sup> Cir. 1995); *United States v.*

1 *Laurent*, 2011 WL 6004606, at \*16. If Mr. Call's continued employment at Citadel Gun & Safe  
 2 involves him either directly or indirectly in the receipt, shipment or transportation of ammunition,  
 3 then he may not continue to work there while under indictment unless §922(n) is unconstitutional  
 4 on its face or as applied to Defendant.

5 **3. Whether 18 U.S.C. §922(n) is Unconstitutional on its Face or as Applied to**  
 6 **Defendant.**

7 Defendant argues that 18 U.S.C. §922(n) is unconstitutional on its face because it violates  
 8 the Due Process Clause of the Fifth Amendment. The Due Process Clause provides that no person  
 9 shall be deprived of life, liberty or property without due process of law. Due process requires some  
 10 form of hearing before a person is deprived of these interests. *Mathews v. Eldridge*, 424 U.S. 319,  
 11 96 S.Ct. 893 (1976). Generally, the opportunity to be heard must be granted at a meaningful time  
 12 and in a meaningful manner. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2649 (2004);  
 13 *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). A two step analysis governs  
 14 procedural due process claims. The first step asks whether there exists a liberty or property interest  
 15 which has been interfered with by the government. The second step examines whether the  
 16 procedures attendant upon the deprivation were constitutionally sufficient. *Sass v. Cal. Bd. of*  
 17 *Prison Terms*, 461 F.3d 1123, 1127 (9<sup>th</sup> Cir. 2006), *overruled in part on other grounds in Hayward*  
 18 *v. Marshall*, 603 F.3d 546, 555 (9<sup>th</sup> Cir. 2010). *See also Mathews v. Eldridge*, 424 U.S. 319, 334-  
 19 35, 96 S.Ct. 893 (1976).

20 To successfully challenge a statute on its face, the defendant must show that no set of  
 21 circumstances exists under which the statute would be valid. *United States v. Laurent*, 2011 WL  
 22 6004606, at \*15, citing *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514, 110 S.Ct.  
 23 2972 (1990) and *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2972 (1987). Because of  
 24 this requirement, *United States v. Peebles*, 630 F.3d 1136, 1138 (9<sup>th</sup> Cir. 2010) states that a facial  
 25 challenge to a legislative act is the most difficult challenge to mount successfully. The court in  
 26 *Peebles* rejected a facial challenge to the mandatory curfew and electronic monitoring pretrial  
 27 conditions in the Adam Walsh Act based on the Due Process Clause and the Eighth Amendment's  
 28 prohibition against excessive bail. The court held that notwithstanding the mandatory requirements

1 of the Adam Walsh Act, the district court retained sufficient discretion as to how or in what manner  
2 the curfew and electronic monitoring conditions are imposed to survive a constitutional challenge  
3 of facial invalidity. The court also rejected the defendant's "as-applied" challenge based on its  
4 findings that the magistrate judge set the release conditions after making an individualized  
5 determination of defendant's circumstances. *See also United States v. Stephens*, 594 F.3d 1033 (8<sup>th</sup>  
6 Cir. 2010).

7 Similar to the defendant in *Peeples*, Mr. Call argues that 18 U.S.C. §922(n) conflicts with  
8 18 U.S.C. §3142(c)(1)(B) of the Bail Reform Act, which provides the court shall order the pretrial  
9 release of the person "subject to the least restrictive condition or combination of conditions" that  
10 the judicial officer determines will reasonably assure the appearance of the person as required and  
11 the safety of any other person and the community. Defendant argues that §922(n) mandates a  
12 condition of pretrial release regarding firearms and ammunition for every person under indictment  
13 regardless of the crime charged and regardless of the particular facts in any given case. *Opposition*  
14 *(#38)*, pg. 4. Defendant argues that this requirement violates his right to keep and bear arms as  
15 protected by the Second Amendment to the Constitution.

16 In *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008), the Supreme Court  
17 held that the Second Amendment protects an individual's right to keep and bear arms. In so  
18 holding, the Court stated that the inherent right of self-defense, particularly in the home, is central  
19 to the Second Amendment right. *Id.* 128 U.S. at 2817. In *McDonald v. City of Chicago*, \_\_\_ U.S.  
20 \_\_\_, 130 S.Ct. 3020 (2010), the Court held that the right to keep and bear arms is a fundamental  
21 right and applies to the states pursuant to the incorporation doctrine of the Fourteenth Amendment.  
22 In so holding, the Court stated that self-defense is a basic right recognized by many legal systems  
23 from ancient times to the present day, and that individual self-defense is the central component of  
24 the Second Amendment right. In both *Heller* and *McDonald*, the Court declared invalid local  
25 ordinances which had the effect of prohibiting the possession of handguns by law abiding  
26 individuals. *McDonald* reiterated the statement in *Heller* that "the [Second Amendment] right  
27 applies to handguns because they are the most preferred firearm in the nation to 'keep' and use for  
28 the protection of one's home and family." *McDonald*, 130 S.Ct. at 3036.



1 *Heller* also stated:

2 Like most rights, the right secured by the Second Amendment is not  
3 unlimited. From Blackstone through the 19<sup>th</sup>-century cases,  
4 commentators and courts routinely explained that the right was not a  
5 right to keep and carry any weapon whatsoever in any manner  
6 whatsoever and for whatever purpose. (Citations omitted) . . .  
7 Although we do not undertake an exhaustive historical analysis today  
8 of the full scope of the Second Amendment, nothing in our opinion  
9 should be taken to cast doubt on longstanding prohibitions on the  
10 possession of firearms by felons and the mentally ill, or laws  
11 forbidding the carrying of firearms in sensitive places such as schools  
12 and government buildings, or laws imposing conditions and  
13 qualifications on the commercial sale of arms.

14 *Heller*, 128 S.Ct. at 2816-17.

15 The Court further noted that the foregoing identification of presumptively lawful regulatory  
16 measures did not purport to be exhaustive. *Id.* at 2817 n. 26.

17 In the wake of *Heller* and *McDonald*, the Courts of Appeal have been called on to decide  
18 whether various laws regulating firearms violate the Second Amendment. In deciding these cases,  
19 the courts have also been required to determine the appropriate standard of scrutiny to be applied to  
20 a particular law.

21 “[T]he Second Amendment can trigger more than one particular standard of scrutiny,’  
22 depending, at least in part, upon ‘the type of law challenged and the type of [Second Amendment]  
23 restriction at issue.’” *United States v. Reese*, 627 F.3d 792, 801 (10<sup>th</sup> Cir. 2010), quoting *United*  
24 *States v. Marzzarella*, 614 F.3d 85, 96-97 (3<sup>rd</sup> Cir. 2010). *United States v. Marzzarella* concerned  
25 the validity of 18 U.S.C. §922(k) which prohibits the possession of firearms with obliterated serial  
26 numbers. The Third Circuit applied an intermediate standard of scrutiny because the burden  
27 imposed by the law did not severely limit the possession of firearms in the manner that the laws  
28 struck down in *Heller* and *McDonald* did. Under the immediate standard of scrutiny, the law  
passes constitutional muster if it serves a significant, substantial or important government interest  
and the fit between the challenged law and its objective is reasonable, not perfect. Under this  
standard, the court upheld §922(k).

In *United States v. Skoien*, 614 F.3d 638 (7<sup>th</sup> Cir. 2010), the Seventh Circuit also applied the  
standard of intermediate scrutiny in upholding 18 U.S.C. §922(g)(9) which prohibits any person



1 convicted of misdemeanor domestic violence from possessing firearms. The court inferred from  
2 *Heller* that some categorical disqualifications regarding firearms are permissible and that  
3 ““Congress is not limited to case-by-case exclusions of persons who have been shown to be  
4 untrustworthy with weapons, nor need these limits be established by evidence presented in court.””  
5 *Reese*, 627 F.3d at 802, quoting *Skoien*, 614 F.3d at 641.

6 In *United States v. Reese*, the court was called on to decide the validity of 18 U.S.C.  
7 §922(g)(8) which prohibits a person against whom a domestic protection order has been entered  
8 from possessing firearms. The court stated that like §922(g)(9), the statute prohibits the possession  
9 of firearms by narrow classes of persons who, based on their past behavior, are more likely to  
10 engage in domestic violence. *Id.* 627 F.3d at 802. The court therefore concluded that §922(g)(8)  
11 was subject to intermediate scrutiny. In upholding the statute, the court cited studies showing the  
12 increased danger of death by firearms in domestic abuse situations. The statute reasonably  
13 furthered the objective of protecting potential victims of domestic abuse from the increased risk of  
14 death or injury posed by firearms.

15 Recently, in *United States v. DeCastro*, \_\_\_ F.3d \_\_\_, 2012 WL 1959072 (C.A. 2 (N.Y.))  
16 (decided June 1, 2012), the Second Circuit, applying the intermediate standard of scrutiny, upheld  
17 18 U.S.C. §922(a)(3), which prohibits anyone other than a licensed importer, manufacturer, dealer  
18 or collector from transporting into his state of residence a firearm purchased or obtained outside  
19 that state. The court stated that the evident purpose of §922(a)(3) is to stop the circumvention of  
20 state laws regulating gun possession. The court held that the statute did not substantially burden  
21 the defendant’s right to keep and bear arms because it does nothing to prevent someone from  
22 purchasing a firearm in his or her home state, which is presumptively the most convenient place to  
23 buy anything. Because it rejected defendant’s as-applied challenge, the court also rejected  
24 defendant’s facial challenge to the statute.

25 Finally, in *United States v. Masciandaro*, 638 F.3d 458 (4<sup>th</sup> Cir. 2011), the Fourth Circuit  
26 upheld a former federal regulation, 36 C.F.R. §2.4(b), which prohibited “carrying or possessing a  
27 loaded weapon in a motor vehicle” within national park areas. The court also applied the  
28 intermediate standard of scrutiny in holding that the regulation was reasonably adapted to the

1 government's substantial interest in public safety in national parks. The court also stated that the  
2 regulation was reasonably limited in its application since it only prohibited the possession of loaded  
3 firearms in motor vehicles within national park areas.

4 The constitutionality of 18 U.S.C. §922(n) has not been addressed by any *post-Heller*  
5 federal appellate court decision.<sup>2</sup> The district court in *United States v. Laurent*, — F.Supp.2d —,  
6 2011 WL 6004606 (E.D.N.Y. 2011), upheld §922(n) under the intermediate standard of scrutiny.  
7 The defendant in *Laurent* was charged with a violation of §922(n) based on his alleged receipt of a  
8 firearm and ammunition after he was indicted for felony crimes of violence and related firearms  
9 offenses. The subject firearm was allegedly discovered in defendant's possession when he was  
10 taken into custody shortly after an attempted robbery. In assessing the burden that §922(n) imposes  
11 on the exercise of Second Amendment rights, *Laurent* stated that the statute is different from a  
12 prohibition on gun possession by a convicted felon which *Heller* described as "presumptively  
13 lawful." A person under indictment is presumed innocent and, until conviction, is not guilty of the  
14 charge that triggers the application of §922(n). "Thus, for purposes of construing the statute, a  
15 defendant under indictment is a law abiding citizen who remains eligible for Second Amendment  
16 protections." *Laurent*, at \*23. In holding that §922(n) is subject to an intermediate level of  
17 constitutional scrutiny, *Laurent* stated:

18 Unlike the total ban at issue in *Heller*, § 922(n) applies only to a  
19 narrow class of persons, rather than to the public at large. It is  
20 substantially similar to § 922(g)(9) and § 922(g)(8), the statutes at  
21 issue in *Skoien* and *Reese*, respectively. Both of those provisions  
22 prohibit the *possession* of firearms by narrow classes of persons who,  
23 based on their past behavior, are more likely to engage in domestic  
24 violence for an unlimited period. Section 922(n) is less restrictive  
25 than either of those statutes, since it only criminalizes shipping,  
26 transportation, or receipt of a firearm, not possession. It also only  
27 applies for the limited period between indictment and either acquittal  
28 or conviction. Intermediate, not strict, scrutiny is appropriate.

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25 <sup>2</sup>The Government argues that *United States v. Lawton*, 366 F.3d 550, 553-4 (7<sup>th</sup> Cir. 2004),  
26 upheld the constitutionality of §922(n), based on the assumption that an individual's right to keep  
27 and bear arms is protected by the Second Amendment. It is questionable, however, whether the  
28 court actually reached the constitutionality of §922(n) since the defendant in that case was  
convicted under another statute, 18 U.S.C. §924(a)(1), for making a false statement to a firearms  
licensee.

1 The court also concluded that §922(n) survives intermediate scrutiny, although it conceded  
2 that “the government’s categorical presumption that all individuals under indictment for a felony  
3 are more likely to misuse firearms is somewhat suspect.” *Id.* at \*26. In holding the the statute was  
4 not facially invalid, the court stated:

5 As demonstrated by the facts of this case, it cannot be said that  
6 Congress' determination to criminalize the act of receiving a firearm  
7 while under indictment was unreasonable, and that “no set of  
8 circumstances ... under which [the statute] would be valid.” *Salerno*,  
9 481 U.S. at 745, 107 S.Ct. 2095. Laurent was initially indicted in  
10 state court for crimes arising out of gun play in a residential building.  
11 He was subsequently arrested after allegedly robbing another  
12 individual at gun point. The fact that Laurent was charged with the  
13 instant crime because he apparently committed a crime of violence  
14 while under indictment undermines any claim he might have that §  
15 922(n) is not substantially related to preventing him from engaging in  
16 further violence. He is hardly the law-abiding householder with a  
17 gun at home to protect his family. The statute is thus also not  
18 unconstitutional as applied to this defendant.

19 *Laurent*, at \*27.

20 Finally, in assessing whether §922(n) violated the defendant’s right to due process, the court  
21 recognized that individuals under indictment have a procedural due process right not to be  
22 needlessly deprived of their liberties, including their Second Amendment rights. *Id.* at \*29. The  
23 court further noted:

24 In [*United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2972 (1987)],  
25 the Court upheld the constitutionality of the Bail Reform Act's  
26 provision permitting “pretrial detention on the ground that the  
27 arrestee is likely to commit future crimes” against a procedural due  
28 process challenge. *Id.* at 744, 750, 107 S.Ct. 2095. The provision  
withstood constitutional scrutiny precisely because it included  
procedural protections—including an individualized finding of risk to  
the public—which are absent from § 922(n). *Id.* at 750, 751–52, 107  
S.Ct. 2095 (internal citations omitted) (emphasis added).

Without an individual determination of risk by the court that issued  
the original indictment, erroneous deprivation is possible in at least  
some cases. While individuals with a history of violent offenses may  
reasonably be suspected to present a high risk of continuing this  
pattern while awaiting trial, the same cannot be said categorically of  
individuals with no criminal background under indictment for  
non-violent crimes. Because section § 922(n) does not require any  
individualized judicial consideration, it burdens all accused persons,  
even those who present no risks.

*Laurent*, at \*30.

1 The court nevertheless concluded that the deprivation of the right to receive or transport a  
2 firearm would not have been erroneous in an individual judicial hearing for the subject defendant  
3 based on the charges in the underlying indictment and the circumstances pertaining to his receipt  
4 and possession of the firearm that gave rise to the charge under §922(n).

5 The *Laurent* court's analysis of §922(n) is persuasive and clearly consistent with the  
6 decisions by the federal courts of appeal upholding other provisions of 18 U.S.C. §922. The factual  
7 circumstances pertaining to Mr. Call are, however, substantially different from those pertaining to  
8 the defendant in *Laurent*. The indictment in this case does not charge Mr. Call with a crime of  
9 violence, nor does he have a prior criminal history of violence or crimes involving firearms. Mr.  
10 Call does not pose a substantial risk that he will engage in future gun violence. If he did, the Court  
11 would not have permitted him to retain three firearms for protection of himself and his family.

12 The prohibition in §922(n), however, is not irrelevant to the criminal charges against Mr.  
13 Call or the conditions of pretrial release that reasonably could or should be imposed on him.<sup>3</sup> The  
14 criminal complaint and the indictment allege that Mr. Call, acting through Citadel Gun & Safe,  
15 received stolen United States military equipment which he sold or offered to sell to confidential  
16 informants or undercover agents. Although the allegedly stolen items did not include firearms,  
17 ammunition or explosive devices, they did include military grade body armor, a chemical warfare  
18 suit, military strength laser pointers, heavy weapons mounts, and night vision goggles. The sale of  
19 such items may be relatively harmless, from the standpoint of future criminal activity, if sold to  
20 individuals who have no sinister plans. It also is reasonably foreseeable, however, that such items  
21 may be illegally purchased or obtained by persons engaged in criminal activity, such as members of  
22 drug trafficking organizations, gang members, or possibly political terrorists.

23 It is not uncommon for courts to impose conditions of pretrial release that attempt to  
24 prevent or reduce the risk that the defendant will engage in similar or related criminal activities to  
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26 <sup>3</sup>18 U.S.C. §3142(g) provides that in imposing conditions of pretrial release, the court may  
27 consider the nature and circumstances of the offense charged and the weight of the evidence against  
28 the person. The weight of the evidence, however, is the least important factor under §3142(g).  
*United States v. Motamedi*, 767 F.2d 1403 (9<sup>th</sup> Cir. 1985).

1 those charged in the complaint or indictment. Defendants charged with crimes involving the use of  
2 computers or the internet may, for example, be denied or restricted in their future access to  
3 computers, including the use of computers at work. Similarly, a defendant may be precluded from  
4 engaging in a certain occupation or employment if there is a substantial risk that the defendant will  
5 use the access provided by the employment to commit additional crimes. Given the nature of the  
6 criminal charges against Mr. Call, a condition of pretrial release that he not engage in the shipment,  
7 transport or receipt of firearms or ammunition, is reasonable and consistent with the purpose of 18  
8 U.S.C. §922(n).

### 9 CONCLUSION

10 Based on the foregoing, the Court concludes that 18 U.S.C. §922(n) is not unconstitutional  
11 on its face, and that its application to Mr. Call in this case does not violate his rights under the  
12 Second, Fifth or Eighth Amendments to the United States Constitution. The Court recognizes that  
13 the statutory prohibition falls more heavily on Mr. Call to the extent it prevents him from earning a  
14 lawful income through his business. The Court is willing to consider proposed conditions of  
15 pretrial release that would permit him to work at Citadel Gun & Safe if it can be done in a manner  
16 that does not violate 18 U.S.C. §922(n). Defendant's proposed condition that he will not  
17 personally order, touch, ship and sell ammunition is not sufficient to meet that requirement,  
18 however, because it does not address Mr. Call's managerial control over the business and its sale of  
19 ammunition. Accordingly,

20 **IT IS HEREBY ORDERED** that Government's Motion to Prohibit the Defendant from  
21 Possessing Firearms and Ammunition (#37) is **granted**, in part, and **denied**, in part as follows:

22 1. The Government's motion is **denied** to the extent it seeks an order barring  
23 Defendant from possessing the three firearms and ammunition that the Court previously authorized  
24 Defendant to keep on October 6, 2011.

25 2. The Government's motion is **granted** as follows: While under indictment in this  
26 case, Defendant is prohibited from shipping or transporting in interstate or foreign commerce any  
27 firearm or ammunition or from receiving any firearm or ammunition which has been shipped or  
28 transported in interstate or foreign commerce. This includes any such acts that are performed by

1 other persons who are under the supervision and control of the Defendant in regard to such acts.

2 **IT IS FURTHER ORDERED** that Defendant may move the Court for permission to work  
3 at Citadel Gun & Safe if he can show that such employment will not involve him, directly or  
4 indirectly, in shipping or transporting in interstate or foreign commerce any firearm or ammunition  
5 or in receiving any firearm or ammunition which has been shipped or transported in interstate or  
6 foreign commerce.

7 DATED this 7th day of June, 2012.

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10 GEORGE FOLEY, JR.  
11 United States Magistrate Judge  
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